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No. 88-149

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SUMMA CORPORATION and WILLIAM R. LUMMIS,
Delaware Ancillary Administrator
of the Estate of Howard R. Hughes,
Petitioners,

v.

TRANS WORLD AIRLINES, INC.,
Respondent.

REPLY BRIEF

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REPLY BRIEF

Nowhere does respondent Trans World Airlines, Inc. ("TWA") contest the central point of the petition ("Pet.") herein—the supposed fiduciary breaches for which Delaware awarded damages against petitioners (collectively "Toolco") are the very same Toolco acts held to be immune from suit in *Hughes Tool Co. v. TWA* ("*Toolco I*"), 409 U.S. 363 (1973). For this and other reasons, TWA's opposition ("Opp.") actually highlights the reasons for review, as well as the suitability of the collateral-estoppel and preemption issues for summary disposition. *See* Pet. 28.

I. TWA'S OPPOSITION HIGHLIGHTS THE NEED FOR REVIEW BY RELYING ON RHETORIC AND DEMONSTRABLE MISSTATEMENTS.

One telling indication of the need for review here is TWA's substitution of emotive rhetoric for analysis in opposing the petition. A recurring theme of TWA's opposition is that petitioners are "wrongdoers" who "cheated" TWA while controlling it from 1955 to 1960. Opp. 14, 17; *see id.* 2, 13-

14, 17. In contrast to TWA's superheated rhetoric, the opinion below ("*Toolco II*") characterized Toolco's transgression under Delaware fiduciary law as "den[ying] TWA the control required to be competitive in the industry." App. 6a. In any event, TWA's rhetoric entirely begs the issue. TWA concedes that the federal and state cases involved the same "acts and injuries." Opp. 3. This Court held that the Civil Aeronautics Board ("CAB") had approved such Toolco acts as in "the public interest" (409 U.S. at 386) and had specifically approved each Toolco-TWA lease transaction as "just and reasonable and in the public interest." *Id.* at 375-76, 379, 383, 387. The very point of Toolco's collateral-estoppel and preemption defenses is that *Toolco I*, section 414 of the Federal Aviation Act of 1958 ("FAA"), and the Supremacy Clause itself all forbid Delaware from substituting for those CAB approvals a state determination that CAB-approved acts constitute actionable "self-dealing."

An even more telling indication of the need for review is the critical role played in TWA's opposition by three demonstrable misstatements. First, TWA states that *Toolco I* turned on principles of preemption that are applicable only to antitrust claims. Opp. 8-9, 11-12. It is true that *Toolco I* involved only antitrust claims (because TWA failed to present its state-law theory to the federal court). But immunity for the Toolco activities at issue there arose not from antitrust-specific principles but rather from the provisions of FAA § 414 relieving Toolco "from the operations of the 'antitrust laws' . . . *and of all other restraints or prohibitions made by, or imposed under, authority of law.*" 49 U.S.C.A. § 1384 (1976); *see* 409 U.S. at 366, 386-87, 388. Moreover, even absent FAA § 414, the Supremacy Clause would prevent Delaware from negating CAB control orders. *See* Pet. 19-20.

Second, TWA claims that "[n]othing in the 1973 opinion [by this Court] suggests a determination that particular damage claims had been rejected for any reason but that TWA's entire antitrust action was preempted." Opp. 13. *Toolco I* did indeed hold that section 414 immunized from suit all "[t]hat TWA charged in its complaint" (409 U.S. at 388), a point that strongly supports Toolco's collateral-

estoppel defense. *See* Pet. 15-16. But, contrary to TWA's assertion, this conclusion grew out of careful analysis of the "particular damage claims" at issue in *Toolco I.* This Court first itemized the "five transactions" whereby TWA came to have (1) fewer jet aircraft than it would have liked, (2) available later than it would have liked, and (3) leased from Toolco rather than owned outright. 409 U.S. at 378-79. The Court then showed that the CAB had approved such "transactions," that they were necessary to effectuate the CAB's public-interest determination, and that suit thereon would negate CAB orders and penalize CAB-approved conduct. *Id.* at 379-89. In short, far from withholding assessment of the "particular damage claims" common to both cases, *Toolcc I* squarely held that suit thereon would defeat the CAB's public-interest determination in contravention of FAA § 414.

Third, TWA states that "the CAB never approved or considered the particular acts of self-dealing." Opp. 16; *see also id.* 14. It is, quite simply, impossible to reconcile this assertion with the Delaware record, the CAB record, or *Toolco I.* In Delaware, as in the federal case, TWA sought and was awarded over $5 million in damages (over $15 million with Delaware interest) for the increased expenses of leasing jet aircraft from Toolco as opposed to owning them outright. *See* Pet. 17. In *Toolco I,* this Court noted at least four times that each and every lease between Toolco and TWA had been specifically considered by the CAB and approved as "just and reasonable and in the public interest." *See* 409 U.S. at 375-76, 379, 383, 387; *see also id.* at 389; App. 203a, 206a, 209a, 211a (CAB orders). Nowhere does TWA even attempt to justify Delaware's award of lease-related damages in the face of the CAB leasing orders and the emphasis on them in *Toolco I.*[1]

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[1] In this regard, it is important to note that the *Toolco II* statement, quoted at Opp. 7, is entirely misleading to the extent it creates an impression that Delaware did not award lease-related damages. For details, *see* Pet. 10 n.19.

II. *TOOLCO I* ESTABLISHED CONCLUSIVELY THAT TOOLCO'S CHALLENGED ACTS WERE WITHIN THE SECTION 414 IMMUNITY.

TWA claims that Toolco's collateral-estoppel point is "one and the same" as its preemption point and that "[t]he correctness *vel non* of the Delaware Supreme Court's decisions is of interest only to Hughes and Toolco." Opp. 10-11. But there is an obvious and important distinction between the points. On preemption, Toolco contends that, even if *Toolco I* had never been decided, the Delaware damage award would be preempted by section 414 and the Supremacy Clause. *See* Pet. 18-21. The collateral-estoppel argument turns on the fact that this Court, after gargantuan federal litigation between these very parties, already has held that the section 414 immunity extends to the very acts upon which damages were predicated in Delaware. *Id.* 13-18. It is plainly of great general importance that decisions of this Court on federal questions be given collateral-estoppel effect in related state-court litigation. *Id.* 11-12.

TWA states wishfully that *Toolco II* presented no collateral-estoppel issue because this Court did not have occasion in *Toolco I* to hold that section 414 bars recovery on TWA's fiduciary-duty theory. *See* Opp. 11-12. But the provisions of section 414 relieve CAB-approved activity equally from "the operations of the 'antitrust laws' . . . and of all other restraints or prohibitions made by, or imposed under, authority of law." 49 U.S.C.A. § 1384 (1976). Nothing in the statutory language permits an inference that actions exempt from an antitrust suit are nonetheless subject to the "restraint or prohibition" represented by a damage action under state law. Moreover, as shown by TWA's own quotation from *Toolco II* (*see* Opp. 7), the Delaware supreme court acknowledged (without following through) that section 414 bars recovery in state fiduciary-duty actions for CAB-approved acts. App. 5a-6a; *see* Pet. 7-10.

In view of the foregoing, the Delaware court correctly held that Delaware could penalize only "conduct which was *not* the subject of CAB review or approval." *Toolco II*, App.

6a (emphasis added). The collateral-estoppel implications of *Toolco I* were thus straightforward. The entire thrust of the *Toolco I* opinion was to determine whether the "five transactions" at issue there had or had not been the subject of CAB review or approval. (*See* pp. 2-3 *supra.*) Since *Toolco II* sought damages for the very same transactions at issue in *Toolco I* (and no others), Delaware was obliged to give collateral-estoppel effect to this Court's prior adjudication that the CAB had approved and thereby immunized the Toolco activities at issue. *See* Pet. 13-18. Instead, without one word of explanation as to why *Toolco I* was not conclusive on these questions, Delaware impermissibly ignored *Toolco I*, wrongly held that the CAB had not approved Toolco's activities, and proceeded to punish acts this Court held immunized. *Id.* 10, 15-18. If this Court were to tolerate this affront, all state courts would be emboldened to presume that this Court is too busy to defend the supremacy and finality of any federal judgment.

III. TWA CASTS NO DOUBT ON THE IMMUNIZING EFFECT OF FAA § 414 AS TO THE TOOLCO ACTIVITIES AT ISSUE HERE.

As noted, the Delaware supreme court acknowledged that section 414 is applicable to state fiduciary-duty actions. TWA nonetheless seems to argue the contrary under the heading "There was no statutory immunity." Opp. 13-17. TWA's argument suffers throughout from fatal flaws already discussed—it is predicated on question-begging rhetoric about "cheating" and "wrongdoers" (*id.* 14, 17) and on repeated misstatements about *Toolco I* and the CAB decisions. *See id.* 16, 17. Nor is there any weight to the hodgepodge of other points argued by TWA.

Without specifying the supposed significance of the point, TWA contends that Toolco's reliance on section 414 is "inappropriate" because Congress " 'clarifie[d]' " the section in 1978 "to eliminate the reference to 'all other restraints or prohibitions.' " *Id.* 9, 11, 14; *see id.* 8-9. Notably, however, TWA dares not assert explicitly that, before the 1978 amendment, the section 414 immunity was somehow limited

to the antitrust laws. Beyond its facially broad language, section 414 was modelled on earlier railroad legislation which has been held several times by this Court to exempt agency-approved actions from a variety of state-law "restraints or prohibitions."[2] Thus, despite the loose usage of the word "clarifies" in the 1978 legislative history (*see* Opp. 15), the 1978 amendments plainly *changed* the scope of the statutory immunity. But this change does nothing to detract from the facts that the statutory immunity extended to "all other restraints or prohibitions" at all times relevant to this case, that Delaware withheld collateral-estoppel effect from *Toolco I*, and that Delaware failed to honor the federal statutory provisions applicable to this case. *See* Pet. 21.

TWA also contends that Toolco seeks "global immunity" for "any injury" inflicted during the period of CAB-approved control (Opp. 10), characterizing Toolco's supposed position as an "extraordinary result" that makes no "sense" and overlooks the preservation of common-law remedies in FAA § 1106 (49 U.S.C. App. § 1506 (1982)). Opp. 8, 13, 15. These points might have some force if TWA had sought judicial recourse for Toolco actions remote from the focus of the CAB's authority under FAA §§ 408 and 414 (49 U.S.C.A. §§ 1378, 1384 (1976)). But TWA's fiduciary-duty action—asserting that Toolco "denied TWA the *control* required to be competitive in the airline industry" (*Toolco II*, App. 6a (emphasis added))—involves issues at the heart of the regulatory structure created by sections 408 and 414.

Through section 408, Congress gave the CAB jurisdiction to decide, as part of its "public interest" determination, whether Toolco control would advance or impede TWA's competitive interests. *See* Pet. 19-20. The very purpose of section 414 was to withdraw conflicting state authority in that area and thereby to ensure that control relationships and transactions considered by the CAB to be "in the public

[2] *See Schwabacher v. United States*, 334 U.S. 182 (1948) (state contract rights upon corporate winding up); *Seaboard Air Line R.R. Co. v. Daniel*, 333 U.S. 118 (1948) (state statute governing place of incorporation); *Texas v. United States*, 292 U.S. 522 (1934) (state statute governing location of facilities and place of incorporation); *see also* Pet. 14 n.26.

interest" would not be burdened or discouraged by otherwise applicable strictures of state law. *See, e.g., Schwabacher v. United States,* 334 U.S. 182, 191-95 (1948).[3] TWA's citation to FAA § 1106 adds nothing, for the generalized preservation of remedies in that section " 'cannot be held to destroy' " the immunizing effect provided in section 414 for CAB approvals under section 408. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298-300 (1976). The remedy for minority shareholders who objected to the competitive consequences of Toolco's control was to invoke the CAB's oversight jurisdiction, not (for example) to persuade Delaware to award damages predicated upon Toolco-TWA lease transactions held by the CAB to be "just and reasonable and in the public interest." *See* 409 U.S. at 375-76, 379, 383, 387.

Finally, ignoring the express preemption provisions of section 414, TWA seeks to defend the Delaware decision under preemption standards that are applied only when Congress has *not* specified the preemptive effect of federal legislation or agency action. *See* Opp. 16-17. None of the cases cited by TWA supports in any way the permissibility of a state's imposing damages, over a provision such as section 414, on a regulated entity for undertaking conduct approved by a federal agency as "in the public interest."[4]

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[3] TWA asserts that "[t]here is no hint of any [irreconcilable] conflict between the federal regulatory scheme and Delaware law." Opp. 17. But this Court has already held that damage actions predicated on Toolco's acts would "negate" CAB orders and "penalize" conduct approved by the CAB. *Toolco I,* 409 U.S. at 388. For detailed discussion of the irreconcilable conflict between the Delaware decision and the relevant FAA provisions and CAB orders, *see* Pet. 19-20.

[4] *See CTS Corp. v. Dynamics Corp. of America,* 107 S. Ct. 1637 (1987) (state takeover statute advanced same policies as does Williams Act); *Louisiana Public Service Comm'n v. FCC,* 476 U.S. 355 (1986) (Congress expressly prohibited FCC from regulating intrastate telephone rates); *Burks v. Lasker,* 441 U.S. 471 (1979) (if permitted by state law *and* consistent with applicable federal statutes, disinterested directors may dismiss derivative suit brought under federal statutes); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) (state-law suit permitted where CAB had neither approved nor required airline's overbooking policy); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (invalidating several state requirements at odds with federal requirements). TWA's sixth authority, *Santa Fe Industries v. Green,* 430 U.S. 462 (1977), is inapposite as it dealt not with preemption but with the issue of whether a federal cause of action existed.

IV. DELAWARE IMPERMISSIBLY ALLOWED TWA TO SPLIT ITS CLAIM FOR RELIEF BETWEEN THE FEDERAL AND STATE ACTIONS.

As shown in the petition, the Delaware supreme court made two alternative holdings in rejecting Toolco's res-judicata defense. *See* Pet. 21-28. Delaware's first—and principal—holding was that this Court's decision in *Toolco I* was not "on the merits" and therefore lacked a prerequisite for res-judicata effect. *Toolco II*, App. 15a-17a; *see* Pet. 26-28. By its silence on this subject, TWA implicitly concedes that Delaware's res-judicata holding cannot be justified on this plainly erroneous ground.

Alternatively, Delaware held that TWA was free to split its claim because it had no obligation whatever to invoke the federal court's pendent jurisdiction over its state fiduciary-duty allegations. *See Toolco II*, App. 19a-22a; Pet. 22-26. TWA concedes that Delaware's ruling is in conflict with the decisions of at least seven state supreme courts, two federal courts of appeals, the Restatement (Second) of Judgments, and the views expressed by three Justices of this Court in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). *Compare* Opp. 22 *with* Pet. 24-25 & nn.36-38. Contrary to TWA's assertions (Opp. 9), the number of decided cases shows that federal-state claim splitting occurs frequently for various reasons, so this conceded conflict strongly supports review of this case. *See* Pet. 25-26.[5]

[5] Contrary to TWA's suggestions (Opp. 23 n.12, 24), the federal trial court clearly would have exercised pendent jurisdiction had TWA sought to present its fiduciary-duty allegations. *See* Pet. 23 & 27 n.39. TWA also hypothesizes that pendent fiduciary-duty allegations initially accepted by the federal district court might have been dismissed without prejudice during the course of the federal litigation, thereby allowing recourse to the Delaware courts. *See* Opp. 21. But in determining whether "there was an opportunity to get to the merits" of the unasserted claims in federal court (C. Wright, *The Law of Federal Courts* 680-81 (4th ed. 1983)), it is irrelevant what the federal trial court might have done to the state-law allegations if the federal allegations had been dismissed in 1961 or 1965. The relevant consideration is that TWA *in fact* had twelve years in federal court (including trial), ample opportunity to litigate its claims. *See* Pet. 24 n.35.

TWA nonetheless contends that review should be withheld because "Hughes and Toolco . . . acquiesced" in TWA's claim-splitting and refrained from raising the defense of "prior pending action." Opp. 4, 18-20. In fact, the Court of Chancery would not have recognized a res-judicata defense predicated upon mere *pendency* of an action in another jurisdiction, requiring instead a prior *judgment* to raise a res-judicata bar.[6] In July 1963, shortly after the federal default judgment, Toolco moved to abate the state action on the grounds that TWA had "deliberately elect[ed] to bring the same cause of action in several jurisdictions" and that the federal default judgment was res judicata of the state action. *See* Opp. App. 17b; Pet. 5 n.13. In fairness to TWA, Toolco suggested that the state action be stayed rather than dismissed *in case* Toolco's then pending federal appeal left "questions to be litigated." Opp. App. 22b ("there may or there may not be some other questions to be litigated"). Far from acquiescing in TWA's claim splitting, Toolco's July 1963 motion put TWA on notice that appropriate res-judicata objections would be forthcoming based on the ultimate judgment in the federal action. So forewarned, TWA still made no effort to invoke federal pendent jurisdiction over its fiduciary-duty claim.[7]

TWA also contends that petitioner Lummis (as ancillary administrator of Mr. Hughes' estate) cannot claim the res-judicata effect of *Toolco I* because Hughes was not served in the federal action. *See* Opp. 21 n.10. However, res-judicata

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[6] *See* Opp. App. 9b, 11b, 17b; 1A Pt. 2 *Moore's Federal Practice* ¶ 0.208b, at 2350-52 (1987); *Kline v. Burke Construction Co.*, 260 U.S. 226, 230 (1922). The four authorities holding a splitting defense to have been waived (Opp. 20) all involved two actions brought in the same jurisdiction. *See also* n.7 *infra*.

[7] Contrary to TWA's implication (Opp. 20), on the above record the Delaware supreme court did *not* hold that Toolco failed "to assert 'splitting.'" The court simply mentioned in passing that Toolco (*i.e.*, the federal defendant) had not "ask[ed] the Federal Court to accept jurisdiction of [TWA's unasserted fiduciary-duty] claims." *Toolco II*, App. 22a. That observation would have been irrelevant had Delaware correctly held that TWA was obliged to invoke federal pendent jurisdiction. *See Rennie v. Freeway Transport*, 656 P.2d 919, 924-25 (Or. 1982).

principles apply to "parties [and] their privies" (*Montana v. United States,* 440 U.S. 147, 153 (1979)) and, as noted by the Delaware supreme court in its res-judicata opinion, "[p]rivity between Hughes and [Hughes Tool] is conceded by each side." *Toolco II,* App. 14a n.1. For this same reason, it is irrelevant that Delaware turned out to be the only forum where TWA could obtain jurisdiction over Hughes. *See* Opp. 9, 21.[8] Because both sides always recognized the privity between Hughes and Hughes Tool, TWA's fiduciary-duty claim could have been fully litigated in the federal action had it been pleaded there but, even before encountering service difficulties, TWA chose to withhold its fiduciary-duty allegations from the federal court.

CONCLUSION

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted. Toolco respectfully renews its suggestion that summary disposition be considered. *See* Pet. 28.

Respectfully submitted,

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[8] Moreover, as an apparent appeal to equities, TWA's argument is highly ironic. TWA unblushingly concedes the unconstitutionality of the sequestration procedures by which TWA compelled Hughes' appearance in Delaware. *See* Opp. 9.